

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :
an agency, and the UNITED STATES OF AMERICA, :

Plaintiffs, :

v. :

WOOD, WIRE AND METAL LATHERS INTERNATIONAL :
UNION LOCAL UNION NO. 46, THE JOINT APPREN- :
TICESHIP COMMITTEE OF THE EMPLOYING METALLIC :
FURRING AND LATHING ASSOCIATION OF NEW YORK :
AND LOCAL NO. 46 of the WOOD, WIRE AND :
METAL LATHERS INTERNATIONAL UNION, :

Defendants-Appellees :

DAVID LLOYD FOREMAN, :

Movant-Appellant :

B
P15
Docket No. 77-6013

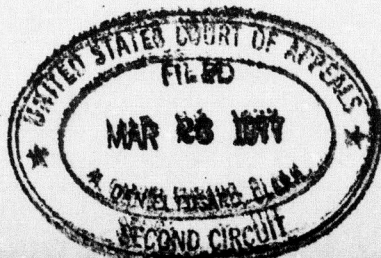
-----X
BRIEF ON BEHALF OF
MOVANT-APPELLANT

Of Counsel
David Raff

Gerald Dunbar
9th Floor
38 Park Row
New York, New York 10038
(212) 566-4889

Employment Law Clinical
Program
Washington Square Legal Serv.
49-51 Chambers Street
New York, New York 10007
(212) 566-1327

Counsel for Appellant



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Gerald J. Dunbar

-----X

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :
an agency, and the UNITED STATES OF :
AMERICA, :

Plaintiff, :

v. :

Docket No. 77-6013

WOOD, WIRE AND METAL LATHERS INTERNATIONAL :
UNION LOCAL UNION NO. 46, THE JOINT AP- :
PRENTICESHIP COMMITTEE OF THE EMPLOYING :
METALLIC FURRING AND LATHING ASSOCIATION :
OF NEW YORK AND LOCAL NO. 46 of the :
WOOD, WIRE AND METAL LATHERS INTERNATIONAL :
UNION, :

Defendants-Appellees, :

DAVID LLOYD FOREMAN, :

Movant-Appellant :

-----X

BRIEF ON BEHALF OF MOVANT-APPELLANT

Gerald J. Dunbar, Esq.
9th Floor
38 Park Row
New York, New York 10038
(212) 566-4889

Of Counsel:
David Raff, Esq.

Employment Law Clinical Program
of Washington Square Legal
Services, Inc.
Suite 220
49-51 Chambers Street
New York, New York 10007
(212) 566-1327

Attorneys for Movant-Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. <u>The Local 46 Litigation</u>	1
B. <u>The Foreman Motion</u>	4
STATEMENT OF FACT	5
SUMMARY OF ARGUMENT	10
ARGUMENT	
I. BACKPAY RELIEF FOR A VIOLATION OF THE COURT ORDERED HIRING HALL RULES IS GOVERNED BY REMEDIAL PRINCIPLES OF TITLE VII... ..	12
A. <u>The Award of Backpay to Appellant is Governed by the Principles of Albemarle Paper Co. v. Moody</u>	15
B. <u>Four Weeks Wages Did Not Make Appellant Whole</u>	17
C. <u>Defendant Has Failed To Meet Its Burden of Showing the Reduction of Appellant's Backpay Award is Warranted</u>	21
II. THE ADMINISTRATOR ERRONEOUSLY PERMITTED THE UNION TO RELITIGATE THE ISSUE OF LIABILITY AT THE HEARING ON MARCH 4, 1976.	26
A. <u>Reliance On Mr. Kruckel's Testimony Was Contrary To Law</u>	27
B. <u>Reliance On Mr. Kruckel's Testimony Was Contrary To The Administrator's Own Decision Of January 20, 1976</u>	30

TABLE OF CONTENTS (con't.)

	<u>Page</u>
III. THE ADMINISTRATOR WAS IN ERROR RELYING UPON THE INVESTIGATION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.....	32
A. <u>The Investigation Undertaken By The EPA Was Inadequate And The Findings Were, Therefore, With- out Probative Value</u>	32
B. <u>The Decision By The EPA Did Not Go To The Merits Of The Complaint</u>	34
C. <u>Assuming, Arguendo, That The EPA's Investigation Was Adequate, It Was Still Completely Irrelevant To The Issue Before The Administrator</u>	35
IV. THE ACCEPTANCE BY THE ADMINISTRATOR OF MR. KRUCKEL'S TESTIMONY WAS IMPROPER AND CONSTITUTED AN ERROR OF LAW.....	35
A. <u>Mr. Kruckel's Testimony About Appel- lant's Alleged Poor Work Habits Was Inherently Unreliable</u>	35
B. <u>Mr. Kruckel's Testimony Was Self- Serving and Therefore Suspect</u>	37
V. THE ADMINISTRATOR WAS IN ERROR IN RELYING UPON THE CONCEPT OF "GANG SENIORITY".....	38
CONCLUSION.....	41

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Albemarle Paper Co. v. Moody,</u> 422 U.S. 405 (1975).....	15,16
<u>Baxter v. Savannah Sugar Refining Corp.,</u> 495 F.2d 437 (5th Cir.), <u>cert. denied,</u> 419 U.S. 1033 (1974).....	29
<u>Day v. Matthews,</u> 530 F.2d 1083 (D.C. Cir. 1976).....	25

TABLE OF AUTHORITIES (con't)

	<u>Page</u>
<u>E.E.O.C. v. Enterprise Ass'n Steamfitter</u> <u>Local 638, 542 F.2d 579 (2nd Cir. 1976)</u>	19,25
<u>E.E.O.C. v. Kallir, Philips Ross, Inc.,</u> <u>420 F.Supp. 919 (S.D.N.Y. 1976)</u>	17,23,24,27
<u>E.E.O.C. v. Local 638...Local 28 of the</u> <u>Sheet Metal Worker's International</u> <u>Ass'n., 532 F.2d 821 (2nd Cir. 1976)</u>	16
<u>Johnson v. Goodyear Tire & Rubber Co.,</u> <u>491 F.2d 1264 (5th Cir. 1975)</u>	25
<u>Meadows v. Ford Motor Co.,</u> <u>510 F.2d 939 (6th Cir. 1975)</u>	17
<u>Patterson v. American Tobacco Co.,</u> <u>535 F.2d 257 (4th Cir.) cert. denied,</u> <u>45 U.S.L.W. 3300 (1976)</u>	17
<u>Pettway v. American Cast Iron Pipe Co.,</u> <u>494 F.2d 211 (5th Cir. 1974)</u>	17,22,25
<u>Rios v. Enterprise Ass'n Steamfitters,</u> <u>Local 638, 542 F.2d 579 (2nd Cir. 1976)</u>	19
<u>Stewart v. General Motors Corp.</u> <u>542 F.2d 445 (7th Cir. 1976)</u>	24,27
<u>United States v. United States Steel Corp.,</u> <u>520 F.2d 1043 (5th Cir. 1975)</u>	21,25
<u>United States v. Wood, Wire and Metal Lathers</u> <u>International Union, Local Union No. 46,</u> <u>328 F.Supp. 429 (S.D.N.Y. 1971)</u>	2
<u>United States v. Wood, Wire and Metal Lathers</u> <u>International Union, Local Union No. 46,</u> <u>341 F.Supp. 694 (S.D.N.Y. 1972)</u>	4
<u>United States v. Wood, Wire and Metal Lathers</u> <u>International Union, Local Union No. 46,</u> <u>471 F.2d 408 (2nd Cir. 1973) cert. denied</u> <u>412 U.S. 939</u>	1

Statutes:

<u>Title VII of the Civil Rights Act of 1964,</u> <u>42 U.S.C. § 2000e et. seq</u>	2
---	---

TABLE OF AUTHORITIES (con't)

<u>Statutes:</u>	<u>Page</u>
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20002-5g.....	15
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20002-5(f) (1).....	35

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt. No. 77-6013

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION
LOCAL UNION NO. 46, THE JOINT APPRENTICESHIP
COMMITTEE OF THE EMPLOYING METALLIC FURRING AND
LATHING ASSOCIATION OF NEW YORK AND LOCAL NO. 46
of the WOOD, WIRE AND METAL LATHERS INTERNATIONAL
UNION,

Defendants-Appellees,

DAVID LLOYD FOREMAN,

Movant-Appellant.

On Appeal for the United States District Court for
the Southern District of New York

BRIEF ON BEHALF OF MOVANT-APPELLANT

STATEMENT OF THE CASE

This appeal is being brought to overturn the decision of the District Court, which denied Movant-Appellant's motion to set aside a Decision of the Administrator in the above-captioned case.

A. The Local 46 Litigation

Defendant Local 46, Wood, Wire and Metal Lathers International Union (hereinafter the Union) is a labor organization which refers workers to two types of jobs in New York City and neighboring counties: metallic lathing and furring or "inside work," which is performed only by men who have received training as apprentices, and concrete reinforcing or "outside work," for which no special skills are required. United States v. Wood, Wire & Metal Lathers, International Union, Local 46, 471 F.2d 408, 410 (2nd Cir. 1973). The Union operates a hiring hall, which now, as in the past, refers out workers to "outside" job sites within its jurisdiction. Prior to the onset of this litigation, the Union, while claiming to refer out both Union and non-Union members for jobs, actually operated the hiring hall in a discriminatory fashion, giving preferences to Local 46 members, practically all of whom were white over non-white "permit men" a far greater proportion of whom were non-white. United States v.

Wood, Wire and Metal Lathers, International Union, Local 46, 328 F. Supp. 429, 432 (S.D.N.Y. 1971).

On May 22, 1968, the United States brought suit against the Union, charging it with engaging in a pattern and practice of discrimination against Blacks in employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. (hereinafter Title VII). The government alleged discrimination by the Union in both union membership and job referral. Eighteen months later, the Union and the government reached a settlement agreement. On February 24, 1970, a Consent Decree was ordered by the Federal District Court, per Judge Frankel. "With the concurrence of the parties in selection, as their agreement contemplated, the court designated" George Moskowitz as Administrator in the Consent Decree. 328 F.Supp. 434.

After the Consent Decree was ordered, however, the Union proved unwilling to carry out the provisions of the agreement. On May 12, 1971, on the government's motion, Judge Frankel adjudged the Union in contempt, and ordered it to pay backpay to those workers who were aggrieved by its illegal conduct. 328 F.Supp. 429. Additionally, the court ordered the parties to attempt to agree on hiring hall rules and procedures for submission to the court.

After the attempts at voluntary agreement failed, the Administrator, pursuant to the May 12 order, submitted a

a proposed set of rules to the court. With some modifications, these rules were adopted by Judge Frankel on July 16, 1971. As ordered, the "Rules and Procedures For Operation of Hiring Hall" consists of 9 rules. Hiring Hall Rule VII (Layoffs) (hereinafter sometimes referred to as Rule VII), which is here at issue, provides:

No workmen shall be laid off until all workmen at his job performing the same class of work who commenced work subsequent to him have been laid off. Nothing in this paragraph shall derogate from the right of an employer to layoff workmen for cause. Any workman who challenges the basis of his layoff shall notify the Administrator in writing within three (3) days of such layoff, setting forth his reasons for regarding the layoff as improper. The workman shall simultaneously send copies to the Union and his employer.

Since the promulgation of the Hiring Hall Rules, the Administrator has heard the complaints of several non-white permit men who alleged that their layoffs were in violation of the rules. Decisions in the matter of David Lloyd Foreman, challenged herein, were issued on September 25, 1975 (A 77-82) January 20, 1976 (A 96-103) and September 27, 1976. (A 182-185). Hiring Hall rule violations in the layoffs of five other permit men were found in a decision of the Administrator dated August 2, 1976. (A 186-194). January 21, 1977, the Union moved in District Court to set aside the latter decision of the Administrator.

The history of litigation in the case graphically illustrates "the union's course of passive resistance and inaction the result of which has been a continuing discrimination against non-white workers." 471 F.2d at 411 quoting 328 F.Supp. at 438. On December 30, 1970, the Administrator, pursuant to the settlement agreement, ordered a minimum total of 250 permits to non-whites to be issued each year. The Union refused to accept the recommendation voluntarily, and, on motion of the government, Judge Frankel issued an order enforcing the recommendations on March 13, 1972. 341 F.Supp. 694. The judgment was affirmed by the Court of Appeals. 471 F.2d 408 (2d Cir. 1973), cert. denied 412 U.S. 939. On January 27, 1977 the government once again moved before Judge Frankel to find Local 46 in contempt.

B. The Foreman Motion

David Lloyd Foreman, a permit holder in Local 46, worked for seven months at the job site of Perini North River Associates until his layoff on December 13, 1974.

A hearing into his layoff was requested by Counsel to Mr. Foreman. This hearing took place on May 5, 1975 (A 3-72) followed by post-hearing memorandum. (A 73-76). The Administrator issued a Decision (A 77-82) on September 25, 1975 finding that the Union had breached a duty owed to Mr. Foreman by virtue of Hiring Hall Rule VII. Both parties

filed Motions for Reconsideration of various aspects of the Decision. (A 83-95). The Administrator, by Decision dated January 20, 1976, (A 96-103) denied reconsideration to Local 46 and granted reconsideration to Mr. Foreman for the limited purpose of ascertaining the length of time that Mr. Foreman's work opportunity would have continued in the absence of his layoff.

The second Hearing was held on March 4, 1976 (A 104-181) and was followed by a Decision nearly seven months later. (A 182-185) On November 14, the Decision was affirmed by the Federal District Court. The last Decision is challenged herein.

STATEMENT OF FACTS

David Lloyd Foreman, Movant-Appellant, worked for seven months at the Perini North River site as a permit holder and was laid off on December 13, 1974. No reason for the layoff was given by the shop steward, Mr. Kruckel (the general foreman) or Mr. Linner (the deputy foreman). (A 20-21; Hearing Record dated May 5, 1975.)

On May 5, 1975, a hearing was held before the Administrator to determine if Mr. Foreman's termination was in violation of the Hiring Hall Rules. At the hearing, Mr. Foreman contended that his termination was not for cause. Consequently, in the absence of proof by the Union that

he was the last hired workman and therefore the first to be legitimately laid off in a reduction of force layoff, his termination was ipso facto violative of Hiring Hall Rule VII. The Union offered the testimony of Mr. Linner, a Union member and Mr. Foreman's supervisor at the Perini site, who made conclusory allegations that Mr. Foreman's work had been unsatisfactory, and that he had been warned to work more quickly on several occasions. (A 39-41). On cross-examination, Mr. Linner admitted that other workers had been similarly corrected in the past. (A 45-46). This was substantiated by Mr. Duggins, another witness for the Union. (A 59-60). The two incidents of alleged misconduct by Mr. Foreman, related by another Union witness, Mr. Peters, had no causal relation to Mr. Foreman's discharge. (A 50-58; Decision by Administrator of September 25, 1975, See also A 73-74; Memorandum of Foreman's Counsel, dated May 28, 1975).

In his decision of September 25, 1975 (A 79-82) the Administrator determined that the Union's conduct with regard to Mr. Foreman's discharge was violative of the Hiring Hall Rules. Specifically, he found that the Union breached its duties under Hiring Hall Rule VII: (a) to investigate and to determine whether the termination was justified and (b) to attempt to seek employer's review and reassessment of Appellant's job performance and to

suggest or recommend some measure of corrective action short of termination. (A 82). Relying on Mr. Linner's testimony that Mr. Foreman's job would only have lasted another month in any case (A 43; Hearing Record dated May 5, 1975), the Administrator awarded Mr. Foreman four weeks backpay. (A 82; Decision of Administrator, dated September 25, 1975). The backpay award was designed to make Mr. Foreman "whole for the lost opportunity" to continue working on the job. (A 82).

After the September 25, 1975 decision, both parties petitioned the Administrator to reconsider the decision. Mr. Foreman's counsel contended that the four-week pay award was inappropriate, since most of the workers in Mr. Foreman's gang remained employed long after the four-week period mentioned by Mr. Linner. (A 85, 90-91). In his January 20, 1976 decision (A 96-103) the Administrator denied the Union's Motion for Reconsideration, and ordered a new hearing pursuant to Mr. Foreman's Motion for Reconsideration to Mr. Foreman, solely for the purpose of determining whether Mr. Foreman's work opportunities would have lasted longer than four weeks were it not for his layoff. Specifically, the Administrator stated that

While it appears presumptively from the tabulations annexed as exhibits that lather work in fact existed and continued beyond the one month testified to, I believe that due process and the merits of the issue will be better served by a hearing to examine the accuracy and reliability of the tabulations, granting to the Union an opportunity to challenge the tabulations and the conclusion based thereon.

I therefore direct the parties to appear at a further hearing in this matter on a date to be scheduled by my office for the presentation of such testimony and other evidence as may be related but limited to the period of time that lather work continued to be performed at the Sewage Treatment Plant construction site at the Hudson River at 135th Street, Manhattan after the layoff of David Lloyd Foreman on December 13, 1974; the number of lathers so employed from December 13, 1974 forward; the turn-over and replacement of lathers if any, from December 13, 1974 forward; the nature of the work performed by lathers from December 13, 1974 forward; and such other evidence as may be relevant but limited to the right of continued employment of Mr. Foreman at the aforesaid job site after December 13, 1974, if any.

(A 102-103).

At the March 4, 1976 hearing, Mr. Foreman's counsel offered evidence that the Lather Work Force had remained essentially intact after the four-week period had expired. Mr. Kruckel, a Union member and Mr. Foreman's general foreman, contended that Mr. Foreman had been laid off for unsatisfactory work performance. In a decision dated September 27, 1976 (A 182-185), the Administrator

reaffirmed his earlier determination. The Administrator made reference to Mr. Kruckel's testimony, and a determination by the Environmental Protection Agency that reasonable cause did not exist for a finding that the employer acted in violation of Executive Order 11246. The Administrator offered no explanation of why the backpay award should be limited to a four-week period; he simply stated that the evidence concerning the lather work force after Mr. Foreman's termination was not "quintessentially relevant" to the question of Mr. Foreman's backpay. Id.

SUMMARY OF ARGUMENT

Appellant David Lloyd Foreman prevailed in a proceeding before the Administrator of Local 46 on the question of whether or not the Union had violated the district court ordered Hiring Hall Rules and Regulations, Rule VII. However, the remedy provided was only four weeks backpay. On a Motion for Reconsideration, Mr. Foreman contended that such award did not reflect the actual work opportunity available at the work site and consequently the limited award failed to make him whole. The Administrator found that there was prima facie evidence to support Mr. Foreman's contention of continued work opportunity and directed that a further proceeding be held to measure the extent of damages that Mr. Foreman was entitled to. Following the second hearing the Administrator upheld his original finding; however, a review of the decision, and the hearing record itself, show numerous errors of law, and further they show that the Administrator failed to address the question that he himself posed, to wit, whether there were work opportunities available to Mr. Foreman beyond the four weeks found in the original decision.

It is Appellant's contention that remedial relief for a violation of the court imposed Hiring Hall Rules and

Regulations is provided in the remedial sections of Title VII, Civil Rights Act of 1964, and that the extent of a backpay award granted is governed by the Supreme Court's decision in Albemarle v. Moody, 442 U.S. 405 (1975). Based upon this premise, Appellant argues that the four week backpay award granted by the Administrator fails to make Appellant whole pursuant to the principles enunuciated in Albemarle and further that the Union has failed to show any reason why their financial liability should be limited.

Additionally, Appellant contends that the Administrator wrongfully permitted the Union to relitigate the merits of the case during the backpay proceeding and relied upon evidence of no probative value to the issue before him.

POINT I

BACKPAY RELIEF FOR A VIOLATION OF
THE COURT ORDERED HIRING HALL RULES
IS GOVERNED BY REMEDIAL PRINCIPLES
OF TITLE VII.

It is uncontested that this litigation had its genesis in Title VII. The 1970 Consent Decree was reached after a Title VII action had been commenced; the 1971 action brought against the Union for contempt of that Decree, which action resulted in the promulgation of the Hiring Hall Rules here under consideration, was brought under Title VII. 328 F.Supp. at 431; see also, 341 F.Supp. 694 (S.D.N.Y. 1971) (judgment enforcing recommendations of the Administrator as to the issuance of work permits), aff'd, 471 F.2d 408 (2d. Cir. 1973). The Hiring Hall Rules were designed to correct the "deep rooted and pervasive practice in this Union of handing out jobs on the basis of Union membership, kinship, friendship and, generally, 'pull'." 328 F.Supp. at 436. The discriminatory impact of those nepotistic measures was specifically found by the court:

the whole story is here, in vivid and repetitive detail. Giving life and point to an impressive statistical demonstration, the Government has shown in case after case the preference of whites over blacks on grounds of nepotism or acquaintanceship. The officers of local did not

merely acquiesce in this state of affairs; many, if not all of them, have been active participants in the pattern of favoritism and its inevitable concomitant, racial discrimination. Id.

Accordingly, Judge Frankel ordered the promulgation of "rules and procedures, setting forth in precise detail a scheme for fair and neutral referrals from the hiring hall." Id. at 440. The instant litigation arose from a violation of the Rules so promulgated. Consequently, this litigation is anchored in Title VII and the determination of remedies for violations of the Hiring Hall Rules must be governed by the remedial provisions of Title VII.

In the case at bar the Administrator found that the Union had violated Hiring Hall Rule VII, and consequently, had breached its duties owed Appellant under the Rule. Rule VII prohibits the laying off of employees out of seniority, unless there is just cause for the layoff. The Administrator found the Union owed its members, as well, as permit-holders, the duty "to ascertain. . .whether [an employer] had just cause to terminate [an employee]" and the concomitant duty "to consciously and conscientiously attempt to seek employer's review and reassessment of [an employee's] job performance and to suggest or to recommend some

measure of corrective action short of termination."

(A 82; Decision by Administrator of September 25, 1975).

These obligations are directly related to the intended purposes of the Hiring Hall Rules, viz., the alleviation of past discrimination. The Administrator, in fact, referred to "[a] history of denial of economic opportunity", which

is not obliterated, nor is the minority worker recompensed by a work assignment through the Hiring Hall, if the Union passively tolerated an employer's exclusive judgment that a minority worker was not working productively. The Union must show some aggressive, positive effort to secure the employer's cooperation towards the setting of standards that are reasonable within the context of specific work assignments and learning time span of those who have been historically, if not traditionally, barred from participating in such work.
Id.

Thus, the Hiring Hall Rules and their interpretation by the Administrator flow directly from Title VII considerations. Consequently, relief for breaches of the Rules must flow from Title VII.

A. The Award of Backpay to Appellant is Governed by the Principles of Albemarle Paper Co. v. Moody.*

Backpay relief is prescribed at 42 U.S.C. § 2000e-5g.** While this provision is couched in terms which accord a court discretion in its use of the backpay remedy, such discretion as exists was circumscribed by the Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975):

[B]ackpay should be denied only for reasons which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.
422 U.S. at 421.

More specifically, the Court held that

Congress' purpose in vesting a variety of discretionary powers in the Courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible 'the fashion[ing of] the most complete relief possible.' Id.

* 422 U.S. 405 (1975).

**"If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . , the Court may. . . order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." (emphasis added).

Appellant contends that the Administrator did not exercise his discretion within the confines of the Albemarle guidelines. After finding "that the Union did not aggressively fulfill its obligation under Rule 7 of the Hiring Hall Regulations to ascertain. . . whether Perini Associates had just cause to terminate Foreman," the Administrator ordered relief in the form of four weeks' backpay. (A 81-82; Decision by Administrator of September 25, 1975). The asserted justification for this award was "that David Lloyd Foreman should be made whole for the lost opportunity to work another month on the job." (A 82) (emphasis added). In this statement, the Administrator recognized, at least in part, the remedial parameters in Title VII dictated by Albemarle. Unfortunately, by his final decision on the extent of backpay, he failed to take cognizance of the full import of the Albemarle guidelines: "[B]ackpay should be given as broadly as possible in order to effectuate the dual standards of remediation and deterrence." E.E.O.C. v. Local 638 and Local 28 of the Sheet Metal Worker's International Ass'n, 532 F.2d 821,832 (2d. Cir. 1976) (emphasis added).*

* Moreover, the "make whole" remedy calls for more than just "straight time" salary. Every element of

B. Four Week's Wages Did Not Make Appellant Whole.

In his decision of January 20, 1976, the Administrator denied the Union's Motion for Reconsideration of the backpay award to Foreman, but granted Appellant's Motion for Reconsideration of the extent of damages due. (A 102-103; Decision by Administrator on Motions for Reconsideration). The determination of the extent of damages was to be made by determining the length of work opportunity that should have remained open to Foreman after December 13, 1975, the date of his termination.

While it appears presumptively from the tabulations annexed as exhibits that lather work in fact existed and continued beyond the one month referred to, I believe that due process and the merits of the issue will be better served by a hearing to examine the accuracy and reliability of the tabulations, granting to the Union an opportunity to challenge the tabulations and the conclusions based thereon. Id. (emphasis added).

* (con't) compensation, including fringe benefits, overtime, and interest accruing from the time of the layoff, are due to the employee. Patterson v. American Tobacco Co. 535 F.2d 257 (4th Cir.), cert. den., 45 U.S.L.W. 3330(1976); Meadows v. Ford Motor Co., 510 F.2d 939, 947 (6th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974); EEOC v. Kallir, Philips, Ross, Inc., 420 F.Supp. 919 (S.D.N.Y. 1976). See also A 159-160.

The Administrator's decision to use the extent of continued work opportunity as the measure of damages incurred by Appellant is consistent with the district court's initial remedy after finding Local 46 in contempt of the court approved Consent Decree because of its continued discrimination in work referrals. The relief ordered by the court, after finding Local 46 in contempt, included (i) the establishment of Hiring Hall rules, and (ii) backpay for all those black permit holders deprived of outside work because of the "unlawful and contumacious practices found in this proceeding." 328 F.Supp. at 441. Such backpay was to consist of "the difference between what they earned. . .and [what] they would have earned but for such unlawful discrimination." 328 F.Supp. at 441. Appellant respectfully submits that this same standard must be applied in those cases in which the Union was found to have violated the Hiring Hall Rules which were designed to prevent the continued practice of discrimination in work referrals. A different computation of backpay for Hiring Hall Rule violations would not only defeat the statutory purposes of the backpay remedy for such violations, but would also defeat the statutory purposes for which the Hiring Hall Rules were imposed.

The appropriate relief due Foreman was an award of backpay until such time as the Union met its obligations of investigating Foreman's claim and attempting to persuade the employer that remedial action other than termination was in order,* or until such time as Foreman would have been laid off in his appropriate position on the seniority list. As the Court of Appeals of the Second Circuit directed in Rios v. Enterprise Ass'n Steamfitters, Local 638, 542 F.2d 579, 590 (2d Cir. 1976), "[i]t is the date of actual remedying of discrimination. . .which should govern" the termination date of the backpay award. The Administrator

* This latter obligation is essential in alleviating the continuing effects of discrimination generated by lack of opportunity for minority workers to learn the skills of the lather industry resulting from this exclusion from the industry by defendant Union. The Administrator made note of the history of denial of economic opportunity to minority workers in the industry: "The Union must show some aggressive, positive effort to secure the employer's cooperation towards the setting of standards that are reasonable within the contexts of specific work assignments and learning time span of those who have been historically, if not traditionally, barred from participating in such work." (A 81; Decision by Administrator of September 25, 1975). The Union's duty to attempt to persuade the employer to take a different course of action than termination of a minority worker is a duty imposed to alleviate the continuing effects of the historical discriminatory denial of employment opportunity to minority workers.

recognized this remedial principle in the cases of Norman Nairne et. al. (A 186-194; Decision by Administrator of August 2, 1976). The Administrator even cited his decision in the David Lloyd Foreman case as dispositive of the obligations imposed on the Union under the Hiring Hall Rules to prevent an unjust termination. (A 192). The Administrator took steps to insure that claimants in the Norman Nairne case would be made whole by ordering the Union to pay each "a sum equal to the amount each of said claimants would have earned had he been laid off in the regular order of seniority. . .as required by Hiring Hall Rule VII." Id.*

Appellant submits that the Administrator abused his discretion under Title VII and Albemarle when he failed to give Appellant that relief which would have made Appellant whole, viz., that amount equal the sum Appellant "would have earned had he been laid off in the regular order of seniority. . ." as required by

* It should also be pointed out that in addition to full backpay, the Administrator required the Union to do all in its power to put these permit-men back to work by (a) making referrals to those jobs from which they were laid off, or (b) making referrals to other jobs, or (c) placing their names at the head of the hiring hall list. (A 193; Decision by Administrator of August 2, 1976.)

Hiring Hall Rule VII. (A 194; Decision by Administrator of August 2, 1976). While the Administrator ordered a hearing on the issue of what amount of backpay would have made Appellant whole for lost work opportunity, he never even addressed the make whole issue in his decision on Appellant's motion. Such a result violates the principles enunciated by the Supreme Court in Albemarle.

C. Defendant Has Failed To Meet Its Burden Of Showing That Reduction Of Appellant's Backpay Is Warranted.

The Administrator, in order to reconsider the extent of Appellant's backpay award, ordered "a hearing to examine the accuracy and reliability of the tabulations" presented by Appellant as evidence of work opportunity at the Perini North River site beyond the four weeks for which backpay had been awarded. (A 102; Decision by Administrator on Motions for Reconsideration). If the Union was desirous of limiting its liability, it had the affirmative duty of showing why the backpay recovery should be limited. In United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), the Court of Appeals explained that,

Once a court has determined that a defendant's inequitable conduct has caused some damages to the class, or a representative sample of its members, then the burden falls upon the wrongdoer to explain away or disprove the damages which each claimant's evidence supports. In other words, our decisions establish that, with respect to computing those damages which are the reasonably certain results of the wrong, 1) unrealistic exactitude is not required [and] 2) uncertainties in determining what an employee would have earned but for the [wrong doing] should be resolved against the [wrong doer]. 520 F.2d at 1050; citing Pettway v. American Cast Iron Pipe Corp., 494 F.2d 411, 460 (5th Cir. 1974).

The allocation of burdens is simply stated as imposing "an initial lighter burden of proof on the backpay claimant with a heavier weight of rebuttal on the employer." Pettway, supra., 494 F.2d at 259. To meet this "heavier burden", the Union had to show,

- (i) the inaccuracy or unreliability of tabulations prepared by Appellant for the purpose of showing continued work opportunity (A 102); or
- (ii) that Appellant failed to mitigate his losses by failing to adequately search for work and by showing that such work was available. EEOC v. Kallir, Phillips, Ross, Inc., 420 F.Supp. 919, 925-26 (S.D.N.Y. 1976).

Defendant made, at best, feeble attempts to establish these objectives, by cross-examination of Ligia Elias of the Bureau of Labor Services as to Appellant's tabulations (A 126-128), and by cross-examination of Appellant as to employment

applications. (A 146-151; Hearing Record of March 4, 1976). There is nothing in the record to establish the inaccuracy or unreliability of Appellant's tabulations.

With respect to the second issue, it is clear that defendant has not met the standard established in EEOC v. Kallir, Philips, Ross, Inc., 420 F.Supp. 919, 925 and 926 (S.D.N.Y. 1976), with respect to inadequate search for employment:

[D]efendant's burden of proving a lack of diligence is not satisfied merely by a showing that there were further actions that plaintiff could have taken in pursuit of employment. Rather, defendant must show that the course of conduct actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.

To sustain its burden of establishing such deductions, the defendant must show not only that plaintiff failed to exercise due diligence in seeking employment, but also that had she been diligent she might have found some employment and had some earnings.

Moreover, the Administrator did not even suggest that reduction of Appellant's backpay award was in any way related to defendant's cross-examination on this matter.

Instead, defendant introduced testimony that Appellant was laid off for cause, and that he would not have been rehired because he did not work productively. While such testimony may have amounted to a defense in the first instance, it should not have been taken to bear on the issue of the extent of liability. Its introduction into a hearing convened solely for the purpose of determining the extent of backpay amounts to an unwarranted relitigation of the merits. Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976); Kallir, supra., 420 F.Supp. at 923. See also, discussion Point III, infra. Its reliability as evidence of the quality of Appellant's work is dubious also. Mr. Kruckel, general lather foreman, made a bald assertion of Appellant's failure to work productively but could not cite a single instance of observing such conduct. (A 136-138; Hearing Record of March 4, 1976). Even assuming that this testimony is relevant to the question of the extent of backpay relief after a violation of the Hiring Hall Rules has been found, the production of this testimony cannot be found to have met defendant's high burden of proof in seeking a reduction of Appellant's backpay. That high burden of proof in an analogous context, search

for work, bears repetition: "defendant must show that the course of conduct actually followed was so deficient as to constitute an unreasonable failure to seek employment." 420 F.Supp. at 925 [emphasis added].

The testimony of Kruckel was not sufficient to meet the high burden on defendant in showing that a reduction of Appellants' award was necessary. Stated concisely, "those courts which have given the most careful consideration to the burden of proof question have held that the employee must prevail unless the employer proves its case with 'clear and convincing evidence.'"

Day v. Matthews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (emphasis added), citing inter alia, Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444-45, (5th Cir.), cert. denied, 419 U.S. 1033 (1974); Pettway v. American Cast Iron Pipe Co., supra, and Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374-80 (5th Cir. 1974).

The corollary of the allocation of burdens is as stated above, that uncertainties in amounts due the claimant are to be resolved in favor of claimants.

United States v. United States Steel Corp., supra; Pettway, supra; EEOC v. Enterprise Ass'n Steamfitter Local 638, 542 F.2d 579, 582 (2d Cir. 1976). The allocation of burdens and the resolution of uncertainties

in favor of the plaintiff are derivatives of the "make whole" purpose mandated by Albemarle, and the Administrator's failure to abide by these principles resulted in his ordering an inadequate remedy for Appellant.

Any monetary award which simply assesses damages for wrongful conduct is punitive in nature; however, Title VII remedies do not include penalties -- which is what the four week award actually is. Appellant does not now seek, nor has he in the past sought, to have a penalty assessed against Local 46. Appellant merely asks that he be made whole for work lost by virtue of defendant's breach of its duties under Hiring Hall Rule VII.

POINT II

THE ADMINISTRATOR ERRONEOUSLY PERMITTED THE UNION TO RELITIGATE THE ISSUE OF LIABILITY AT THE HEARING ON MARCH 4, 1976.

At the hearing on backpay of March 4, 1976, the only evidence presented by Respondent was the testimony of Eugene Kruckel, general lather foreman at the Perini North River site. The essence of this testimony was Mr. Kruckel's claim that Mr. Foreman was discharged because he was a poor worker. Appellant submits that the

Administrator's reliance on this testimony in reaching his decision of September 27, 1976 was erroneous as a matter of law.

A. Reliance On Mr. Kruckel's Testimony Was Contrary To Law

The decision in Albemarle establishes that parties aggrieved by discriminatory practices are entitled to backpay awards except in exceptional circumstances. (See Point I, supra). Subsequent decisions have established that in determining the extent of a backpay under Title VII, the merits of the plaintiff's discrimination claim will not be considered. The rationale of these decisions is that the defendant has already had the opportunity to contest plaintiff's claim on the merits, therefore, the backpay question should not provide a forum for relitigation of precisely that issue. In Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), the defendant, who had been found to have violated Title VII, argued that backpay should not be awarded since "[t]he plaintiffs have failed to show a single employee who can claim he was injured by the Company's policies." The court rejected the argument, characterizing it as "nothing but an attempt to relitigate whether discrimination occurred at all." 542 F.2d at 452.

Equal Employment Opportunity Commission v. Kallir,

Philips, Ross, Inc., 420 F.Supp. 919 (S.D.N.Y. 1976), is also apposite. In that case, the defendant-employer argued that in computing the backpay award of an employee who had been wrongfully discharged, salary increases she would have received should not be included according to the employer, salary increases were granted solely on an individual basis, and it was "highly speculative" to include such increases in determining backpay. The court responded:

The short answer is that where one's conduct has prevented a precise computation of damages, the injured party is not to be deprived of adequate damages. [A]ll doubts are to be resolved in favor of the injured party; the wrongdoer does not become the beneficiary of his own wrongful conduct . . . [T]his court has already rejected defendant's contention that McGee's job performance was the cause of her discharge. Id. at 923 (emphasis added).

The relevance of these cases to the case at bar is apparent. Following the hearing of May 5, 1975, the Administrator ruled that Appellant's discharge was in violation of the Hiring Hall Rule VII, (A 80-82; Decision of September 25, 1975) and ordered that Appellant be "made whole" for his lost work opportunity.(Id.). On Appellant's motion, the Administrator order a new hearing solely to determine the extent of the backpay award. (A 102-103; Decision of January 20, 1976). At that hearing,

which was held on March 4, 1976, Appellant offered proof that his work opportunity would have continued long after the four week period for which he was awarded backpay under the September 25, 1975 decision. The only direct evidence offered by the Union was the testimony of Mr. Kruckel (which merely reiterated the earlier allegation by the Union, at issue in the May 5, 1975 hearing, that Appellant was laid off for poor work performance), and a letter from the Environmental Protection Agency which purported to show that Appellant's layoff was not a consequence of his race. None of this evidence brought to light any "special factors" which would relieve the defendant of a duty to pay backpay under Albemarle. Nor did it deal directly with the amount of backpay which defendant should be required to pay. Under Stewart and Kallir, evidence of this sort should not have been considered in determining the extent of backpay.

Appellant urges this court to follow the Stewart and Kallir cases. At some point, litigation on the merits must be concluded. If this court were to rule otherwise, it would establish a precedent which would permit a defendant, during a backpay proceeding, to raise issues previously litigated and ruled upon. Furthermore, it would raise the spectre of finding liability with

no remedy. Any time liability were found a defendant could argue that since the plaintiff's work performance was unsatisfactory it would not take the plaintiff back and, therefore, no backpay should be awarded. Such a result would lack rationality and would undermine the remedial provisions of Title VII.

B. Reliance On Mr. Kruckel's Testimony Was Contrary To The Administrator's Own Decision of January 20, 1976.

The Administrator in his January 20, 1976 decision (A 96-103) ruled on the motions of Appellant and Respondent for reconsideration of the initial determination in the Foreman case. The motion of the Union, which objected to even a four week backpay remedy, was denied. (A 100-101; Decision of January 20, 1976). The Appellant's motion was granted, and the Administrator ordered a hearing "to examine the accuracy and reliability of the tabulations [prepared by Appellant's counsel indicating that Appellant's work opportunity would have continued for longer than four weeks], granting to the Union an opportunity to challenge the tabulations and the conclusion based thereon." Specifically, the Administrator stated that the purpose of the hearing was to permit

the presentation of such testimony and other evidence as may be related but limited to the period of time that lather work continued to be performed at the Sewage Treatment Plant Construction site at the Hudson River at 135th Street, Manhattan after the layoff of David David Lloyd Foreman on December 13, 1974; the number of lathers so employed from December 13, 1974 forward; the turn-over and replacement of lathers from December 13, 1974 forward; the nature of the work performed by lathers from December 13, 1974 forward; and such other evidence as may be relevant but limited to the right of continued employment of Mr. Foreman at the aforesaid job site after December 13, 1974, if any. (Emphasis added)

(A 102-103).

The Administrator thus stated, in no uncertain terms, that the second hearing was to deal exclusively with events at the Hudson River site after December 13, 1974, the date on which Appellant was laid off. Under no conceivable reading of the January 20, 1976 decision could evidence concerning Appellant's job performance be permitted at the second hearing. Yet when that hearing was held, such testimony was introduced, and, over the objection of Appellant's counsel, admitted. (A 130; Hearing of March 4, 1976). Seven months later, the Administrator issued a third decision, which affirmed his original decision of September 25, 1975. (A 182-185). The reasoning behind this decision is obscure. Without

explanation, the Administrator indicated that he had to "take into account the testimony of Mr. Kruckel, the General Lather Foreman, who testified that Mr. Foreman was laid off because he was not regarded as a satisfactory worker." (A 183).

Clearly such finding is contrary to the Administrator's own directive. The original determination of the Administrator -- that Appellant's discharge was in violation of Hiring Hall Rule VII -- became the law of the case for all purposes after the January 20, 1976 decision.*

POINT III

THE ADMINISTRATOR WAS IN ERROR IN
RELYING UPON THE INVESTIGATION BY
THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY.

A. The Investigation Undertaken By The EPA Was Inadequate
And The Findings Were, Therefore, Without Probative
Value.

When Appellant was terminated he filed a complaint with the Environmental Protection Administration [EPA]

* On January 20, 1976, the Union's motion for rehearing on this issue was denied. The decision was never appealed to the District Court thus establishing it as the law of the case.

claiming that Perini was engaged in conduct violative of Executive Order 11246. The EPA was required to investigate and then make findings as to whether or not there was reason to believe that violations occurred. It is Appellant's contention that there was no adequate investigation, and that consequently the findings of the EPA are without probative value.

During the hearing on March 4, 1976, Kruckel, the General Lather Foreman at the work site, testified that he had control over the hiring and firing of lathers at the job site. (A 136). Consequently, the decision to terminate Appellant Foreman was made by Kruckel. Yet, Kruckel's testimony clearly shows that Mr. Smallwood, the EEO officer of the EPA, never questioned Kruckel, the one person responsible for the discharge.

Q. Do you know to your knowledge, whether Mr. Smallwood ever held any hearing on Mr. Foreman's complaint?

A. I know he was on the job walking around, talking to people.

Q. Did he talk to you?

A. No, Sir.

Q. Do you know whether he held any hearing regarding Mr. Foreman's complaints?

A. No, Sir.

(A 135).

One can hardly imagine how an adequate investigation

could have been made if the person responsible for terminating Appellant's employment, Kruckel, was never even questioned by the investigator. Quite the contrary, it seems clear that the investigation was totally inadequate. Consequently, for this reason and for the reasons set forth below, the Administrator's reliance upon the results of the EPA's investigation (A 135) were misplaced.

B. The Decision By The EPA Did Not Go To The Merits Of The Complaint.

The decision of the EPA, dated May 16, 1975, merely stated that "there is insufficient evidence to substantiate your allegation. . ." It was held that "reasonable cause" did not exist to believe that Executive Order 11246 was violated. It would be a serious misinterpretation of the effect of that letter to claim that it is dispositive of the issue of Appellant's termination. Unfortunately, that is precisely what the Administrator appears to have done.

All the EPA found was that "reasonable cause" for Appellant's claim did not exist. Under Title VII, a finding of no "reasonable cause" merely means further action on the complainant's behalf will not be made the United States. Nonetheless, complainant himself is entitled to proceed directly into Federal District

Court, where he may indeed prevail. 42 U.S.C. §2000e-5 (f)(1). Clearly, the EPA's finding was not on the merits; therefore, the Administrator's reliance upon the letter was misplaced.

C. Assuming, Arguendo, That The EPA's Investigation Was Adequate, It Was Still Completely Irrelevant To The Issue Before The Administrator.

Whatever investigation may have been conducted by the EPA was strictly limited to possible violations of Executive Order 11246 by the Employer, Perini North River Associates. The EPA investigation was not concerned with the Union's conduct. However, the Administrator specifically found that the liability in this case rested with the Union for violating its obligations under Rule VII of the Hiring Hall Rules and Regulations. Therefore, even assuming that the EPA conducted a thorough investigation, the EPA letter was not related to the issue before the Administrator, to wit, whether the union was liable for more than four weeks backpay.

POINT IV

THE ACCEPTANCE BY THE ADMINISTRATOR OF
MR. KRUCKEL'S TESTIMONY WAS IMPROPER
AND CONSTITUTED AN ERROR OF LAW.

A. Kruckel's Testimony About Appellants Alleged Poor Work Habits Was Inherently Unreliable.

The basis of the Union's defense at the first hearing

was that Appellant was an ineffectual worker and was discharged for cause. Nevertheless, the Administrator found that the Union had violated Hiring Hall Rule VII. (A 77-82). Why the administrator should make an about face and now accept the same assertions which were once before rejected, remains a mystery.

In his decision of September 27, 1976, the Administrator stated, "I must also take into account the testimony of Mr. Kruckel, the General Lather Foreman, who testified that Mr. Foreman was laid off because he was not regarded as a satisfactory worker." (A 183). Yet, the cross-examination of Mr. Kruckel at the hearing on March 4, 1976 by Appellant's counsel revealed that Mr. Kruckel could not identify a single instance of Mr. Foreman's alleged poor work habits. The Administrator himself recognized this fact by stating,

He [Mr. Kruckel] didn't say he made his own observations. He said he relied on his foremen.

In light of the failure of Kruckel to point out a single instance where Mr. Foreman failed to perform up to satisfactory work standards, it appears that the Administrator simply made an error in giving weight to the testimony.

B. Mr. Kruckel's Testimony Was Self-Serving And Therefore Suspect Because Of His Status As A Union Member.

Despite the attempt by the Union to portray Mr. Kruckel as merely the Employer's foreman solely interested in his employers well being, this contention is not reflected by the record. At the same time that Mr. Kruckel was the head foreman on the job, he also was a journeyman member of Local 46. His loyalties went not only to the employer, who was, after all, only his employer for as long as he continued working at that particular jobsite; his loyalties also went to the Union, of which he must remain a member in good standing if he is to continue working in the industry. In fact, the actual choice of Mr. Kruckel as foreman may have been completely fortuitous since the Administrator stated,

It is frequent if not universal practice that the first man assigned to a job site is designated as foreman.

(A 100).

It seems quite proper, then, to claim that Mr. Kruckel's loyalties to the Union are at least as great as, if not greater than his loyalties to his temporary employer. In his Decision on the Motions for Reconsideration, the Administrator stated:

Furthermore, while the Union's argument that it has no control over a supervisor or foreman who is performing his duties as a management representative appears to have a sound superficial basis, it is, in my judgment, not consistent with the historic or realistic relationship between the Union and the industry. Foremen are members of Local 46; their membership, union loyalty, union obligations and other perquisites of membership are not placed in suspension or "blind trust" during any period of service as foreman or supervisor. This is implicit, if not self-evident in the structure and obligations set forth in the Hiring Hall Rules and Regulations.

(A 99-100).

Having lost the initial hearing on the merits and having had its motion for reconsideration on the merits denied, the Union put Mr. Kruckel on as a witness in an attempt to limit the Union's liability. Considering the inherently self-serving nature of Mr. Kruckel's testimony, it seems incredible that the Administrator would give weight to such testimony.

POINT V

THE ADMINISTRATOR WAS IN ERROR IN
RELYING UPON THE CONCEPT OF "GANG
SENIORITY."

It is clear under the Hiring Hall Rules and Regulations that seniority is determined by seniority on the site. In his decision of September 25, 1975, the Administrator held that Appellant would only receive four weeks

backpay because "the gang of which Foreman was a member was going slow and would have continued for another month." (A 82). In his decision on September 27, 1976, based upon the testimony received at the hearing of March 4, 1976, the Administrator stated, "I cannot ignore the evidence that, after December 13th, others who had been working in the cofferdam gang with Mr. Foreman were also laid off." (A 183). By both explicitly and implicitly accepting seniority within the particular cofferdam gang as the basis for seniority at the Perini job site, the Administrator has acted contrary to the mandate established in Rule VII of the Hiring Hall Rules and Regulations.

In the case of Norman Nairne, et al, dated August 2, 1976, the Administrator found that the proper measure of seniority was site seniority. (A 188-189).

Rule VII of the Hiring Hall Rules and Regulations states in part,

No workmen shall be laid off until all workmen of his job performing the same class of work who commenced work subsequent to him have been laid off.

The concept of site seniority was challenged by the Union, claiming "that the concept of job security is completely foreign to the building and construction industry." (Id.). Yet, as the Administrator noted in the Nairne

decision, Judge Frankel implicitly recognized this concept by approving Hiring Hall Rule VII. (Id.).

The record showed that Foreman had over seven months of seniority at that job site, longer than most lathers at Perini. There is no basis for distinguishing Appellant's case from that of Nairne, et al. The Administrator has contradicted himself by relying on site seniority in one case and rejecting it in another. However, since the concept of site seniority is embodied in the court approved Hiring Hall Rules and Regulations, it was error for the Administrator to rely upon gang seniority in deciding Appellant's case.

Even if it were to be argued that gang seniority was the proper standard for determining seniority at Perini, many in Appellant's gang would have been laid off before Appellant was. This is particularly true since Appellant, with seven months seniority in the gang, had amassed more seniority than others in the gang. However, Kruckel's testimony clearly shows that six out of eight members of Appellant's cofferdam gang received other job assignments at the Perini project even after work on the cofferdam ceased. Of those two who did not remain at the job site, one was shifted to another job as a shop steward and one worker left for reasons that may be related to a physical injury. (A 141-143).

Thus, Appellant contends, and the record supports his contention, that but for the Union's breach of Hiring Hall Rule VII, Appellant would have been transferred within the job site, and might have been working to this very day.

CONCLUSION

For the reasons stated herein, Appellant respectfully requests that this matter be remanded to the District Court for a finding as to the amount of backpay Appellant would have earned had he been laid off in the regular order of seniority.

Dated: March 25, 1977

Of Counsel:
David Raff, Esq.

RESPECTFULLY SUBMITTED,

Gerald J. Dunbar, Esq.
9th Floor
38 Park Row
New York, New York 10007
(212) 566-4889

Employment Law Clinical Program
of Washington Square Legal
Services, Inc.
Suite 220
49-51 Chambers Street
New York, New York 10007
(212) 566-1327

Attorneys for Movant-Appellant

Doran, Collieran, O'Hara, Pollio & Dunne, P.C.
1140 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10036

Received

3/25/77

3:50 P.M.

M. Harene
Secretary & Walter M. Collieran, Eng.